



FOIP FOLIO

NEW FACES AT THE OIPC

Welcome to Shawna Dashney who has joined the OIPC in a one year term position as Administrative Coordinator. Shawna recently returned to Saskatchewan from Edmonton, where she was employed with Alberta Finance and Enterprise as a Program Coordinator with Employment Pensions in the Financial Sector Regulation and Policy Division. Shawna enjoys spending time with her family (including three "furry" children) and friends, as well as participating in outdoor activities. She is looking forward to working with the OIPC and as well, she is excited to cheer for the Riders on home turf this season!

On the investigations side, we welcome Melanie Coyle in another term position. In 2007, Melanie returned to her home town of Regina after completing the Masters of Health Administration program at the University of Ottawa. Since her return, she has been working for the Regina Qu'Appelle Health Region as a resident in the Risk Management department and then as Coordinator of Physician Retention. Melanie began her career as a Page in both the Legislative Assembly of Saskatchewan and the Senate of Canada and also worked for the Vice President, University Relations at the University of Ottawa. She is very excited about spending the next year in the OIPC!

CAPTURED ON CAMERA



Google's "Street View" application will soon include images of public places in Canada. The Privacy Commissioner of Canada, Jennifer Stoddart, and her provincial colleagues who oversee a private sector privacy law (British

Columbia, Alberta and Quebec) have jointly produced a fact sheet: *Captured on Camera, Street-level imaging technology, the Internet and you*. Those four Commissioners have offered information for Canadians about the technology as well as the relevant legal considerations. You can access this fact sheet at www.privcom.gc.ca.

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SASKATCHEWAN COMMISSIONER REAPPOINTED



On March 30, 2009 the comments from FOIP FOLIO readers are Legislative Assembly welcome. Once the plan has been completed, it reappointed **Gary Dickson** as will be posted to our website, www.oipc.sk.ca Information and Privacy Commissioner for an additional five years. As a next step, the OIPC is now developing a five year plan for its office and activities. Any suggestions or

PRIVACY ENHANCING TECHNOLOGIES – WHY THE DELAY?

Dr. John Borking, former Data Protection Commissioner for the Netherlands, has written an interesting piece on why privacy enhancing technologies (PETS) have not been more widely

and more quickly adopted. You can access his commentary at <http://www.madrid.org/cs>.

TREATING PRIVACY VIOLATIONS SERIOUSLY

In a Los Angeles hospital, 15 workers were terminated for looking at the medical records of **Nadia Suleman**, the octuplet mother, when they had no authority to do so. Eight other workers face disciplinary action. Key to the discovery of this privacy breach was the monitoring of computer activity by the hospital administrators. This follows similar high profile snooping cases involving the medical records of California First Lady, Maria Shriver, at UCLA Medical Centre. In October 2008, Governor Arnold

Schwarzenegger supported two new laws that imposed harsher penalties on hospital workers who inappropriately access patient personal health information. There are fines of up to \$250,000 for offenders. Governor Schwarzenegger stated that "Medical privacy is a fundamental right and a critical component of quality medical care. Repeated violations of patient confidentiality are potentially harmful to Californians, which is why financial penalties are needed..."

FRAUD AWARENESS MONTH

The month of March was Fraud Awareness Month. Check out information on our website about identity theft including descriptions of what this fast-growing crime involves, action victims can take and advice on how to avoid

becoming a victim of identity theft. A list of resources to avoid identity theft or to respond to theft of your identity is available at our website under the *Resources* tab.



REFLECTIONS ON LEAHANN MCELVEEN PRESENTATION

The Privacy and Access Law Sections of the Canadian Bar Association (Saskatchewan) hosted Leahann McElveen from the Office of the Alberta Information and Privacy Commissioner for twin presentations in Regina and Saskatoon in early March, 2009.

Leahann provided a timely and thought provoking presentation on new developments in Alberta with respect to the Electronic Health Record (EHR). She reviewed the role of Netcare in coordinating that province's EHR, the particular complaint that led to her investigation under Alberta's *Health Information Act* and her findings and recommendations. In the report she dealt with the question of accountability in the EHR context, and the unique provision in Alberta that a trustee must consider the wishes of the patient when making a decision about disclosure of personal health information.

She then discussed the Alberta Government's response in the form of Bill 52 and the kind of submissions that have been made to the Alberta Legislative Committee considering Bill 52. Bill 52 died on the Order Paper this spring. Alberta's experience should be of interest to Saskatchewan trustees under our *Health Information Protection Act* (HIPA) since Alberta is the most advanced Canadian jurisdiction in terms of EHR implementation. A copy of Leahann's PowerPoint slide deck is available from our office at 787-8350 or toll-free at 1-877-748-2298. What follows is a March 18, 2009 editorial reprinted with the permission of the Edmonton Journal:

Bill 52 could compromise medical privacy

Are Albertans in danger of having our most private medical details open to scrutiny by strangers? If a bill currently before the legislature passes without amendment, the

answer could be "yes." Nearly everyone agrees in principle that creating comprehensive electronic health records (EHRs) is a desirable and overdue tool for improving health outcomes. As in virtually every other area of endeavour, accessing important information digitally is vastly superior to storing and retrieving paper files or other faded remnants of the past. Given the pressing need to modernize our patient histories in North America, and governments' current recessionary commitment to stimulus programs, the timing couldn't be more propitious to get things moving in earnest. Alberta is but one jurisdiction wisely contemplating just that. While efficiencies are welcome and can even make the difference between life and death, however, we must remember that assembling electronic medical trails is a far different business than, say, transferring auto parts inventories or media archives to databases. In the case of EHRs, we are talking about what can be the most sensitive material imaginable, our intimate life stories writ large. Surely it must remain a fundamental right of Canadians to have this sort of information kept private, and our trusted health-care professionals bound by statute and solemn oath to respect that privacy.

DATA COULD AFFECT JOBS

*Imagine what outside sources might do with the knowledge of past divorces, treatment for emotional difficulties, pregnancy termination, drug use in the distant past, and a long list of other afflictions, suspected or real, "major" or "minor." Lives could be ruined, jobs could be lost, and insurance, travel or adoptions denied. Of course, certain EHRs are available now and have been for some time. But access to them is currently governed by Alberta's *Health Information Act*, which strictly limits who can be privy to the data and faithfully records exactly who has been peeking in.*



REFLECTIONS ON LEAHANN MCELVEEN PRESENTATION — continued

Citizens currently have the right to—if admittedly not without some difficulty—seek out the names of those who engage in such legal “disclosures” any time a request for private medical information is made. If, on the other hand, the government's current Bill 52 is enacted without amendment or a fundamental re-think, all that will change.

While it promises to streamline the spawning of EHRs, the new legislation also contains at least two odious changes that all of us should fear. First, unlike existing law, there will be no traces or audits available to identify who is accessing individual electronic medical records. And second, information will be shifted from the watch of doctors to government control. Physicians who refuse to share the personal details of their patients will be liable for non-compliance fines ranging from \$200,000 to \$500,000 per patient.

WILL PATIENTS HOLD BACK?

Aside from the obvious horrors of such a near-Orwellian system, a myriad of other negative consequences come to mind.

For example, faced with the possibility that certain maladies might become public, it's only natural some patients will refuse to divulge them to their doctors, endangering themselves and others. Also, in the event that private health insurers are one day allowed into our provincial mix, companies might be able to cherry-pick the “best” clients.

And perfectly honest and committed health-care professionals could find themselves forced to choose between obeying an unjust law and honouring their oaths along with the bedrock foundation of doctor-patient privilege.

Why is a professed conservative government with populist roots floating such patently big-brother-style corporatist nonsense without serious consultation? The least disturbing explanation is that controlling instincts of an individual minister or two, or their bureaucrats, are at work. Rumour has it that the battle on Bill 52 may boil down to an internal PC party struggle between caucus and some cabinet bigwigs.

MEDICAL ASSOCIATION WANTS SECOND EFFORT

For its part, the Alberta Medical Association, hardly a radical socialist outfit, is about to engage in one of its most aggressive lobbying efforts ever to oppose Bill 52. Physicians and their patients are being lobbied to contact MLAs and the premier, following a scathing, effective submission made to the standing committee on health last month. That body has three options at its disposal -- passage of the bill as written, sending it back for amendments or not proceeding.

Sensibly, the AMA supports the third position, counselling for a fundamental redrafting of a new bill that will bring Alberta into the 21st century of health care without compromising the hard-won rights and freedoms of patients.

Other jurisdictions from Europe to Australia have accomplished this balancing act, and the U.S. Congress is already taking steps to do so in its fast-track program. There is absolutely no reason why Albertans should expect any less diligence.

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FOIP FOLIO note: The bill in question has died on the Order Paper. It is not known if it will be reintroduced in the future.



ENHANCED DRIVER'S LICENSE—DEAD IN SASKATCHEWAN

In response to Bill 72, *The Traffic Safety Amendment Act*, a report from Commissioner Gary Dickson was tabled in the Legislative Assembly. The report was dated March 6, 2009 and outlined a number of questions and concerns with respect to the proposal for the Enhanced Driver's Licence (EDL). The Commissioner's report is available under the *What's New* tab at our website, www.oipc.sk.ca.

On March 23, 2009, the government announced that it would not proceed with the Enhanced

Driver's Licence project. The New Brunswick government announced on March 31, 2009 that it also had decided not to proceed with EDL. The Prince Edward Island government has followed suit. The Alberta government announced last fall that it would not issue EDLs. Those four provincial governments, as well as the federal government, have been encouraging Canadians to ensure they obtain a passport prior to June 1, 2009 to allow entry by car into the United States (U.S.). In any event, travellers will still require a passport to fly into the U.S.

NEW ONTARIO OIPC ORDERS



Ontario Assistant Commissioner, Brian Beamish, has brought to our attention two recent Orders dealing with Universities that have only recently been brought under that province's Freedom of Information and Protection of Privacy (FOIP) legislation.

In Order PO-2755 Lakehead University was ordered to withhold certain third party information to protect the confidential "informational assets" of the third party's business. The exemption in question is similar to

section 17 of the Saskatchewan FOIP Act. The balance of records were ordered to be disclosed to the applicant since the burden of proof had not been met to support the third party exemption.

In Order PO-2758, the Ontario Commissioner's office ordered McMaster University to provide copies of contracts between the University and food and beverage companies. In this case, there was an absence of detailed and convincing evidence to establish a reasonable expectation of harm. Both of these Orders are available at www.ipc.on.ca.

BROWN BAG LUNCHEONS — REGISTER EARLY!

The March 2009 Brown Bag session was led by Aaron Orban, Portfolio Officer, on the topic of *How to Sever Documents*. This program has been designed for FOIP Coordinators, Privacy Officers and others working for trustee or public sector organizations.

The next noon hour session will be Wednesday, April 29, 2009 on **Fees and Fee Estimates** at 503, 1801 Hamilton Street. To register contact Larissa McWhinney at 798-0303 or by e-mail: lmcwhinney@oipc.sk.ca. There will be handouts and resource lists for attendees. Participants may join the session via conference call as long workshops so you are encouraged to register arrangements are made with Larissa ahead of early.

The May 27, 2009 session will be **Duty to Assist** and the June 16, 2009 topic will be **Third Party Notice & Intervention**. To register contact Aaron Orban at 798-4155 or e-mail: aorban@oipc.sk.ca.



INFORMATION COMMISSIONER OFFERS STRONG CRITICISM

Required reading for our Saskatchewan Access and Privacy community should be the recent report of the Information Commissioner of Canada: *Report Cards – Systemic Issues Affecting Access to Information in Canada 2007-2008*.

Robert Marleau, Information Commissioner, has focused his efforts on analyzing factors that create delays across the system, such as “the rising number of consultation requests, the use of lengthy extensions and multi-layered approval process”. Commissioner Marleau observed that “a strong regime requires the will and leadership necessary to guide a cultural change away from a tendency

to withhold information to a true climate of openness, Government officials must be empowered and learn to act in the spirit as well as the letter of the law.”

Commissioner Marleau’s institutional report cards feature the following: Canada Border Services Agency, Department of Justice Canada, Department of National Defence, Foreign Affairs and International Trade Canada, Health Canada, Library and Archives Canada, Natural Resources Canada, Privy Council Office, Public Works and Government Services Canada and Royal Canadian Mounted Police.

UK PHYSICIANS OPPOSE NEW INFORMATION



In early March, the Chairman of the British Medical Council (BMC), **Dr. Hamish Meldrum**, stated he was “extremely concerned” with a new Coroners and Justice Bill that would allow the Department of Health to disclose information on National Health System databases with other government departments and private firms. Clause 152 in the Bill would allow a Minister to sign an information sharing order that permits the disclosure of personal health information to another department,

USES OF PERSONAL HEALTH

individual or corporation provided it is “necessary to secure a relevant policy objective” and if the order “strikes a fair balance between the public interest and the interests of any person affected by it”. The BMC has advocated that this proposed legislation could undermine patient’s confidence in the new electronic health record system being implemented in the UK. The BMC has been supported on this issue by other regulatory colleges and health provider organizations. For more information: <http://web2.bma.org.uk>.

TASMANIA'S NEW DIRECTION FOR FREEDOM OF INFORMATION

The Australian state of Tasmania has embarked on a review of its *Freedom of Information Act 1991*. In August 2008, Premier **David Barlett** announced a ten point plan to strengthen trust in democracy and political processes in Tasmania. That jurisdiction has now published *Strengthening Trust in Government...everyone's*

right to know. This useful document is available at <http://www.justice.tas.gov.au>. The existing regime in Tasmania is interesting since it considers information as a broad collection, rather than just documents as would be the case in all Canadian jurisdictions.



ALBERTA COMMISSIONER CRITICIZES DISCLOSURE OF PERSONAL HEALTH INFORMATION (PHI) TO U.S.A. COURT



A somewhat unusual fact situation was considered recently by the Alberta Information and Privacy Commissioner Office. In their Investigation Report H2009-IR-002, the Alberta office considered whether a physician had acted properly in disclosing personal health information in response to a subpoena from a Montana court. While the Portfolio Officer, **Brian Hamilton**, found that the physician acted in good faith, he failed to recognize that there is a general prohibition in Alberta's *Health Information Act* against disclosing personal health information in response to foreign subpoenas. Mr. Hamilton concluded that when considering responding to a foreign subpoena or other court order, custodians must take reasonable steps to ensure that it has been recognized by a court with jurisdiction in Alberta

or Canada, or get consent from the patient to disclose their health information. The Investigation Report is available online at www.oipc.ab.ca.

Our office has not issued any recommendations on this question in Saskatchewan to date. There is provision for a trustee to disclose without consent to a court or tribunal under section 27(4) (i) of HIPA. It may well be that we will follow the Alberta interpretation and consequently you should consider two better options: (1) There is provision in *The Evidence Act* (section 65) whereby someone in a foreign jurisdiction can seek a Saskatchewan court order requiring a Saskatchewan trustee to testify under oath; or (2) alternatively, the patient may be prepared to provide written authorization under sections 15 and 56 of HIPA to allow the disclosure to a foreign court.

LAW SOCIETY MODEL CODE FOR CLIENT IDENTIFICATION AND VERIFICATION

New rules are in place for Saskatchewan lawyers to establish the identity of their clients. This entails the production of identification documents from clients. We have received complaints that some lawyers are asking for Saskatchewan Health Insurance cards to prove identity. Those lawyers are then making and retaining a copy of those cards. This practice appears to offend section 11 of HIPA. That provision permits anyone to refuse to produce his or health services number to any person, other than a health information trustee who is providing a health service. Section 11 also prohibits a person from requiring anyone to produce a health services

number as a condition of receiving any service. In addition, there are problems with retaining copies of identification cards. For more information, you can review the joint publication, *A Guide for Retailers – Collection of Driver's Licence Numbers Under Private Sector Privacy Legislation* available at www.oipc.ab.ca, www.oipc.bc.ca, and www.privcom.gc.ca. This publication emphasizes that the production of driver's licences to verify identity for certain retail purposes is one thing but the retention of copies of such an identity document is problematic.



STAPLES SELLS USED COMPUTER WITHOUT WIPING HARD DRIVE



A Staples store in Ottawa sold a used computer with hundreds of files on the external hard drive in March 2009. Apparently the original owner thought he had deleted the files before returning it to Staples.

This case provides a timely reminder that

consumers need to be more careful about what personal information is on computers that they dispose of -- hitting the delete button isn't adequate. Before disposing of a computer the owner should use a proper scrubbing program. Scrubbing involves random data recorded on the drive and then erasing that data over and over so that the original data is lost.

NEW PRIVACY BOOK: LESSONS FROM THE IDENTITY TRAIL

Professor Ian Kerr, Canada Research Chair in Ethics, Law and Technology, and Professor Valerie Steeves (University of Ottawa), have published an important book that features a number of excellent essays on anonymity, privacy and identity in a networked

society. This book is available through the publisher, Oxford University Press, at www.oup.com.

FUTURE EVENTS

April 29, 2009 – OIPC Brown Bag Workshop: *Fees and Fee Estimates* - 503-1801 Hamilton Street. To register contact Larissa McWhinney at 798-0303 or e-mail: lmcwhinney@oipc.sk.ca.

May 27, 2009 – OIPC Brown Bag Workshop: *Duty to Assist* - 503-1801 Hamilton Street. To register contact Aaron Orban at 798-4155 or e-mail: aorban@oipc.sk.ca.

May 31-June 3, 2009 - e-Health 2009: *Leadership in Action* – Quebec City, Quebec
(visit <http://www.e-healthconference.com/> for more details)

June 10-12, 2009 – University of Alberta: *Access and Privacy Conference 2009* – Edmonton, Alberta
(visit <http://www3.extension.ualberta.ca/accessandprivacy/> for more information)

June 16, 2009 - OIPC Brown Bag Workshop: *Third Party Notice & Intervention* – 503-1801 Hamilton Street. To register contact Aaron at 798-4155 or e-mail: aorban@oipc.sk.ca.

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